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IN THE

Supreme Court of the United States

October Term 1965
No. 586

GERALD DALE HENSEL,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

Petition For a Writ of Certiorari to the District Court of Appeal of California, Second Appellate District.

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IN THE

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GERALD DALE HENSEL,

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BRIEF FOR PETITIONER.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the District Court of Appeal of the State of California entered on April 26, 1965.

Citations to Opinions Below.

The opinion of the District Court of Appeal of the State of California is reported at 233 A.C.A. 999 (1965). The order of the Supreme Court of California denying hearing is not officially reported, and it is set forth in the appendix (see accompanying certified record).

Jurisdiction.

The order of the Supreme Court of California denying hearing was entered on June 23, 1965. The jurisdiction of the Court is invoked pursuant to Title 28.

United States Code § 1257(3), petitioner having asserted below, and asserting here, deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Question Presented.

The issue presented is whether clandestine surveillance by the police of a public restroom by means of a secret spyhole is an illegal invasion of privacy; and whether the admission of evidence obtained by such surveillance is a violation of petitioner's rights under the Fourth, Fifth and Ninth Amendments to the Constitution of the United States secured to him by virtue of the Fourteenth Amendment.

Statutory and Constitutional Provisions Involved.

1. This case involves the Fourth, Fifth and Ninth Amendments to the Constitution of the United States.

2. It also involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Statement.

All the facts are contained in the preliminary transcript [C. T. pp. 2-18].

Arthur J. Madrid testified as a witness on behalf of the people and stated that he was a police officer of the City of Los Angeles, assigned to Highland Park Vice.

That on January 9, 1963, at approximately 1:15 p.m., he and his partner arrived at Arroyo Seco Park. He then took a vantage point, overlooking the men's restroom which was reached by going up a ladder from the tool shed adjoining the restroom and looking down through a ventilation screen.

That he saw petitioner and his co-defendant near the urinal area of the restroom.

That he saw petitioner and co-defendant engage in an act of oral copulation after which he went down and effected the arrest.

That at the time he made these observations he was standing on a ladder looking down through a vent in the attic above the tool shed next to the restroom. When the officers went into the restroom to make the arrest, petitioner's penis was in his pants and Officer Madrid testified that the only time he was able to determine that there was a violation was when he was looking through the vent from the attic [C. T. p. 13].

How Federal Questions Were Raised and Decided.

At the preliminary hearing a motion was made to strike the testimony of Officer Madrid on the basis that it was unlawful search and seizure as defined by *Britt v. Superior Court,* 58 Cal. 2d 469. The motion was overruled [C. T. p. 13].

On Appeal to the District Court of Appeal, petitioner urged that the evidence against him was illegally obtained and, thus, was inadmissible. This appeal was based on the Fourth and Fifth Amendments to the Constitution of the United States and was rejected by the court. (*People v. Hensel,* 233 A.C.A. 999, 1001-1002).

On petition for hearing to the Supreme Court of California it was again argued that petitioner's rights were violated by the invasion of his privacy. Hearing was denied on June 25, 1965.

Reasons for Granting the Writ.

I.

The observations by the police officer through a spy-hole constituted a violation of Petitioner's right of privacy guaranteed by the Fourth, Fifth, and Ninth Amendments to the Constitution.

This Court has recognized a constitutional right of privacy on numerous occasions. The most recent example is found in *Griswold v. Connecticut,* .....U.S....., 14 L. ed. 2d 510, in which the Court held that the Connecticut statute making the use of contraceptives a criminal offense was invalid as an unconstitutional invasion of the right of privacy of married persons.

In giving the opinion of the Court, Mr. Justice Douglas discussed the nature of the right of privacy and the grounds upon which it is based. After discussing *NAACP v. Alabama,* 357 U.S. 449, 462, *Sweezy v. New Hampshire,* 354 U.S. 234, 249-250, 261-263, and numerous other cases, Justice Douglas stated as follows:

> "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See Poe v. Ullman, 267 U.S. 497, 516-522, 6 L ed 2d 989, 1003-1007, 81 S. Ct. 1752 (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another

facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'

The Fourth and Fifth Amendments were described in Boyd v. United States, 116 U.S. 616, 630, 29 L ed 746, 751, 6 S Ct. 524, as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life. We recently referred in Mapp v. Ohio, 367 U. S. 643, 656, 6 L ed 2d 1081, 1090, 81 S Ct. 1684, 84 ALR 2d 933, to the Fourth Amendment as creating a 'right of privacy, no less important than any other right carefully and particularly reserved to the people.' "

Griswold v. Connecticut, supra at p. 514.

Petitioner contends that the admission of the evidence obtained by spying into the restroom was in violation of his right to privacy secured under the Fourth, Fifth, and Ninth Amendments to the Constitution as described above by Mr. Justice Douglas. In Griswold, both the Court's opinion and the concurring opinions of Justices Goldberg, Brennan, and Chief Justice Warren indicate the vitality of the Ninth Amendment in its relation to privacy as a right retained by the people. Patterson, The Forgotten Ninth Amendment (1955).

It has been held that this right to privacy is a fundamental right which is included in the Fourteenth Amendment, and is therefore applicable to the States, *Mapp v. Ohio,* 367 U.S. 643, 656:

> "Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice."

The constitutional right of privacy has been increasingly recognized in recent years, and it seems clear that Petitioner has a particularly valid claim for constitutional protection. The right of privacy in connection with the Fourth and Fifth Amendments was the first type of privacy acknowledged by the Court and has been the most jealously protected. Privacy has been the central concept of search and seizure since the now historic decision of *Boyd v. United States,* 116 U.S. 616:

> "The principles laid down in this opinion (by Lord Camden in Entick v. Carrington, 19 Howell's

> State Trials 1029) affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life."
>
> *Id.* at p. 630.

Rather than being eroded with time, the Boyd decision has grown in stature through the years.

> "The authority of the Boyd decision has never been impeached. Its basic principle, that the Fourth and Fifth Amendments interact to create a comprehensive right of privacy, of individual freedom, has been repeatedly approved in the decision of this Court." *Lopez v. United States,* 373 U.S. 427, 456 (dissent by Mr. Chief Justice Warren); citing, among other cases, *Bram v. United States,* 168 U.S. 532, 543, 544; *Gouled v. United States,* 255 U.S. 298, 306; *Amos v. United States,* 255 U.S. 313; *Counselman v. Hitchcock,* 142 U.S. 547, 562.

The concept of privacy in connection with the Fourth and Fifth Amendments has never been construed in a narrow manner. In *Wolf v. Colorado,* 338 U.S. 25, 27, it was said that the gist of the Fourth Amendment is "[t]he security of one's privacy against arbitrary intrusion by the police". In *Olmstead v. United States,* 277 U.S. 428, Mr. Justice Brandeis in a famous dissenting opinion explained the nature and scope of constitutionally protected privacy:

> "The protection guaranteed by the (Fourth and Fifth) Amendments is much broader in scope.

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. . . ."
>
> *Id.* at p. 478.

The *Griswold* case indicates that the right of privacy is becoming increasingly important in modern society. The combination of increased population growth and modern electronic eavesdropping devices require increased protection of the privacy of every individual. *Silverman v. United States,* 365 U.S. 505; King, Electronic Surveillance and Constitutional Rights: Some Recent Developments and observations, 33 Ga. Wash. Rev. 240 (1964); Comment, Do We Have to Live with Eavesdropping: A Legislative Proposal, 38 S.C.L. Rev. No. 4 (1965).

This protection does not refer only to an individual's home or his person. In *Lanza v. New York,* 370 U.S. 139, 143, it was said that "the Court has been far from niggardly in construing the physical scope of Fourth Amendment protection". Protected areas listed in that

decision were a business office, store, hotel room, automobile, and even an occupied cab. *Id.* at p. 388, and cases cited therein.

In the *Lanza* case the majority held that a jail was not a constitutionally protected area, but this was based on the traditional nature of prison security. Surveillance is the normal way of life in a jail with prisoners and their possessions constantly being searched and inspected. This is clearly not true of a restroom. No one expects to be spied upon when they enter a restroom whether it be public or private. It has not been traditionally a place of Government surveillance and the mind rebels at the thought of peepholes and hidden policemen in such a private place. The next step would be to replace the policeman with a television camera in the peephole or air vent which would allow constant surveillance of numerous restrooms.

The evidence gathered through spying into a restroom is offensive in another manner. Inevitably innocent and guilty alike are spied upon, and the result is a completely indiscriminate surveillance and gathering of evidence.

> "The requirements of the Fourth Amendment are not technical or unreasonably stringent; they are the bedrock rules without which there would be no effective protection of the right to personal liberty. A search for mere evidence offends the fundamental principle against self-incrimination, as Lord Camden clearly recognized; a merely exploratory search revives the evils of the general warrant, so bitterly opposed by the American Revolutionaries; and without some form of notice, police searches become intolerable intrusions into the pri-

vacy of home or office." *Lopez v. United States, supra,* at p. 464 (Dissent by Mr. Chief Justice Warren).

In California the Supreme Court has also recognized the privacy element of search and seizure. *Bielicki v. Superior Court,* 57 Cal. 2d 602, 371 P. 2d 288 (1962). In a later case the same court held that an individual is entitled to privacy in a public restroom even if the individual's behavior might have been observable by a member of the general public entering the restroom. *Britt v. Superior Court,* 58 Cal. 2d 469, 472, 374 P. 2d 817 (1962). The important fact is that the police officer did not observe as a member of the public might have, but rather from a secret hiding place *without* the knowledge of the defendant. The court rejects the argument that the police should be able to spy if the individual does not have a completely private stall in the restroom.

> "This proposed distinction is equally unsound as applied to the facts here established. The crucial fact in Bielicki was neither the manner of observation alone nor the place of commission alone, but rather the manner in which the police observed a place—and persons in that place—which is ordinarily understood to afford personal privacy to individual occupants. Of course, clandestine observations by police officers of premises devoted to common use by the general public—such as for example, the shopping areas and public hallways and elevators of the department store here involved—is not prohibited by our decision in Bielicki. (See p. 609(9) of 57 Cal.2d.) But it is equally clear that authority to maintain clandestine surveillance

of common use public places and persons therein is not the equivalent of license to surreptitiously invade the right of personal privacy of persons in private places. Man's constitutionally protected right of personal privacy not only abides with him while he is the householder within his own castle but cloaks him when as a member of the public he is temporarily occupying a room—including a toilet stall—to the extent that it is offered to the public for private, however transient, individual use."

Id. at p. 472.

Conclusion.

Wherefore, for the foregoing reasons Petitioner prays that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Pro Se.